139 Nev., Advance Opinion 5

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORTH LAS VEGAS INFRASTRUCTURE INVESTMENT AND CONSTRUCTION, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant, vs. CITY OF NORTH LAS VEGAS, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, Respondent.	No. 83257
CITY OF NORTH LAS VEGAS, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, Appellant, vs. NORTH LAS VEGAS INFRASTRUCTURE INVESTMENT AND CONSTRUCTION, LLC, A NEVADA LIMITED LIABILITY COMPANY, Respondent.	No. 83617

Consolidated appeals from a district court judgment and a post-judgment order denying attorney fees and awarding costs in a contract action. Eighth Judicial District Court, Clark County; Elizabeth Gonzalez and Susan Johnson, Judges.

Affirmed (Docket No. 83257); affirmed in part, reversed in part, and remanded (Docket No. 83617).

Campbell & Williams and Philip R. Erwin and Samuel R. Mirkovich, Las Vegas,
for Appellant/Respondent North Las Vegas Infrastructure Investment and Construction, LLC.

Hone Law and Jill Garcia and Eric D. Hone, Henderson,
for Respondent/Appellant City of North Las Vegas.

BEFORE STIGLICH, C.J., PARRAGUIRRE, J., and GIBBONS, Sr. J.[1]

OPINION

By the Court, STIGLICH, C.J.:

In this opinion, we consider a district court's discretion to decline to award costs to a prevailing party for expenses the party incurred in its efforts to comply with a district court discovery order. This court has repeatedly emphasized that taxable "costs must be reasonable, necessary, and actually incurred." *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015). Despite the district court's wide discretion to determine which costs meet these criteria, we take this opportunity to clarify that court-ordered costs are necessarily incurred and, so long as they are actually incurred and reasonable, are taxable.

Below, after entering judgment in favor of the prevailing party on the underlying breach-of-contract claims, the district court issued a post-judgment order denying the prevailing party's motion for attorney fees and retaxing costs. Docket No. 83257 is an appeal from the district court's

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[1]The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.

judgment, and Docket No. 83617 is an appeal from the court's post-judgment order. We consolidated the appeals for resolution and now conclude that the district court did not err in entering judgment in favor of the prevailing party on the breach-of-contract claims. Further, the district court did not abuse its discretion in denying the prevailing party's motion for attorney fees. We conclude, however, that the district court abused its discretion to the extent it denied the prevailing party's request for the costs incurred for trial technology services. Thus, while we affirm the district court's judgment in Docket No. 83257, we reverse in part the post-judgment order retaxing costs in Docket No. 83617 and remand to the district court for further proceedings.[2]

FACTS AND PROCEDURAL HISTORY

In 2016, appellant/respondent North Las Vegas Infrastructure Investment and Construction, LLC (NLVI) submitted the winning bid for respondent/appellant City of North Las Vegas' (the City) proposal seeking a financing partner to develop the Apex Industrial Park (Apex) in North Las Vegas, and the parties entered into a letter of intent (LOI). NLVI then contracted with nonparty Poggemeyer Design Group, Inc. (PDG) to begin the initial design and infrastructure work.

Section 2 of the parties' LOI provides that NLVI would "design, construct, and finance" specified infrastructure items and that, "[a]mong other things, the City will create the revenue streams necessary to pay for the [p]roject, including establishing the special improvement district and

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[2]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted. While Judge Susan Johnson signed the order at issue in Docket No. 83617, we note that Judge Elizabeth Gonzalez ruled on the motions underlying that order and entered the judgment appealed in Docket No. 83257 before her retirement.

tax increment districts, [and] connection fee and service charges." Section 3(a) of the LOI addresses rights and responsibilities upon the LOI's termination, providing in relevant part that

> [w]ithin 30 days of termination of the LOI, the City will reimburse [NLVI] for all expenses paid under the [PDG] Contract, and [NLVI] will assign [its] rights, title and interest in the [PDG] Contract to [the] City.

The LOI also references multiple external documents that were attached to it as exhibits, including the City's request for proposal, NLVI's winning proposal, a term sheet, and NLVI's contract with PDG. Pursuant to the terms of both the LOI and its contract with PDG, NLVI was responsible for funding PDG's work. After a short period of time, NLVI stopped making payments, and PDG ceased all work at Apex. The parties agreed to terminate the LOI, and NLVI demanded the City reimburse it for the nearly $3 million it owed or had paid to PDG. The City refused, and NLVI filed the underlying breach-of-contract action seeking reimbursement.

After a bench trial, the district court entered judgment for the City, concluding that although Section 3(a) of the LOI suggests that the City agreed to reimburse NLVI for its PDG-related expenses, the LOI and its appendices as a whole made clear that the City only agreed to *facilitate* reimbursement through various means. The court later denied the City's motion for attorney fees and granted, in part, NLVI's motion to retax the City's costs. As relevant here, the district court declined to award costs incurred by the City for videotaping three depositions, for utilizing an electronic discovery database, and for electronic trial preparation services. NLVI appeals from the district court's judgment in Docket No. 83257, and the City appeals from the district court's attorney fees and costs order in Docket No. 83617.

DISCUSSION

We first address NLVI's argument that the district court erred in finding that the LOI did not require the City to reimburse it for its PDG costs. We then address the City's argument that the district court abused its discretion in its attorney fees and costs award.

The district court correctly found that the LOI did not require the City to reimburse NLVI for its design costs

In Docket No. 83257, NLVI argues that the district court erred in its ambiguity analysis concerning Section 3(a) of the LOI. It contends that the plain language of Section 3(a) requires the City to repay it for all amounts it paid or owed PDG for the work at Apex. The City responds that it never agreed to repay NLVI for its PDG-related expenses; it only agreed to *facilitate* repayment by imposing taxes and related charges on Apex landowners and passing that revenue on to NLVI.

Whether a contract is ambiguous is a question of law this court reviews de novo. *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013). "A contract is ambiguous if its terms may reasonably be interpreted in more than one way, but ambiguity does not arise simply because the parties disagree on how to interpret their contract." *Id.* (internal citations omitted). Indeed, "[c]ontracts must be read as a whole without negating any term." *Fed. Nat'l Mortg. Ass'n v. Westland Liberty Vill., LLC*, 138 Nev., Adv. Op. 57, 515 P.3d 329, 334 (2022). Thus, even if a contract contains an ambiguous term, extrinsic evidence is not considered if the meaning of the ambiguous term or portion of the contract can be ascertained by reviewing the contract in its entirety. *See Halling v. Yovanovich*, 391 P.3d 611, 618 (Wyo. 2017) (looking to the contract as a whole to interpret a provision before considering parol evidence); *cf. MMAWC, LLC v. Zion Wood Obi Wan Tr.*, 135 Nev. 275, 279, 448 P.3d 568,

572 (2019) (providing that the court's goal in contract interpretation is to identify the intent of the parties, which is generally "discerned from [the contract's] four corners" (quoting *MHR Capital Partners LP v. Presstek, Inc.*, 912 N.E.2d 43, 47 (N.Y. 2009))). This would include reviewing any documents incorporated by reference or appended to the contract at issue.[3] *See Lincoln Welding Works, Inc. v. Ramirez*, 98 Nev. 342, 345, 647 P.2d 381, 383 (1982) (holding that where a separate writing is "made a part of the contract by annexation or reference," the writing will be construed as a part of the contract (quoting *Orleans Hornsilver Mining Co. v. Le Champ d'Or French Gold Mining Co.*, 52 Nev. 92, 98-99, 284 P. 307, 309 (1930))).

Here, the district court determined that although Section 3(a) of the LOI was not ambiguous when read alone, it was ambiguous when read in the context of the entire agreement. The district court further found that when reading the entirety of the LOI, including the appendices attached thereto, the City's repayment obligation was limited to facilitating repayment rather than repaying NLVI directly. We agree. Section 2 of the LOI explains that NLVI would be responsible for designing, constructing, and financing the development of specified infrastructure at Apex, while the City would "create the revenue streams necessary to pay for" that infrastructure through various enumerated means.[4] And the LOI's appendices, namely NLVI's response to the City's request for proposal and

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[3]We therefore reject NLVI's argument that we should not consider the appendices to the LOI to ascertain the parties' intent—Section 2 explicitly incorporated the appendices into the LOI.

[4]Although Section 2 did not survive the LOI's cancellation according to the terms of the LOI, we may still look to the LOI as a whole to construe the provision at issue here. *See Halling*, 391 P.3d at 618.

the parties' agreed-upon term sheet, also provide that the City would "facilitate the making of payments and repayments from" tax districts and other fees to NLVI, with no language making the City responsible for the payments otherwise. In fact, Exhibit C to the LOI provides that the City will commence with repaying NLVI "upon substantial completion of the Project" and that such payments would come from assessments and other service fees. Because the LOI as a whole makes clear that the City's repayment obligation stemmed from its eventual collection of taxes and other fees from Apex landowners, which never occurred, the City did not breach the contract by failing to repay NLVI. Thus, the district court properly entered judgment for the City on NLVI's breach-of-contract claims.[5]

Attorney fees and costs

In Docket No. 83617, the City challenges the district court's order denying its motion for attorney fees and retaxing certain costs. The City contends that the district court abused its discretion because (1) it made inadequate findings as to the four factors set forth in *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), regarding offers of judgment; and (2) the City demonstrated that each of its claimed costs were "reasonable, necessary, and actually incurred," *Cadle Co.*, 131 Nev. at 120, 345 P.3d at 1054. We review the district court's refusal to award attorney fees and its decision to retax costs for an abuse of discretion. *See Wynn v.*

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[5]Given our conclusion, we need not reach NLVI's remaining arguments regarding the district court's refusal to make a pretrial determination as to whether Section 3(a) of the LOI was ambiguous and its admission of parol evidence.

Smith, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001) (attorney fees); *Logan v. Abe*, 131 Nev. 260, 267, 350 P.3d 1139, 1144 (2015) (costs).

The district court did not abuse its discretion by denying the City's request for an award of attorney fees

"At any time more than 21 days before trial," a party may serve a written offer "to allow judgment to be taken in accordance with [specified] terms." NRCP 68(a). If a party rejects such an offer of judgment and "fails to obtain a more favorable judgment[,] . . . the offeree must pay the offeror's post-offer costs and expenses" that were "actually incurred by the offeror from the time of the offer." NRCP 68(f)(1)(B). When considering whether to grant a prevailing party's request for attorney fees pursuant to NRCP 68(f)(1)(B), the district court must consider four factors:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the . . . offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the . . . decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

Beattie, 99 Nev. at 588-89, 668 P.2d at 274. As this court has recognized, "the district court is vested with discretion to consider the adequacy of [an NRCP 68] offer and the propriety of granting attorney fees." *Certified Fire Prot., Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 383, 283 P.3d 250, 258 (2012). "Although explicit findings with respect to [the *Beattie*] factors are preferred, the district court's failure to make explicit findings is not a per se abuse of discretion." *Wynn*, 117 Nev. at 13, 16 P.3d at 428; *see also Certified Fire Prot.*, 128 Nev. at 383, 283 P.3d at 258 (same). So long as "the record clearly reflects that the district court properly considered the *Beattie*

factors, we will defer to its discretion." *Wynn*, 117 Nev. at 13, 16 P.3d at 428-29.

The City focuses on the district court's minute order, which only mentioned one of the four *Beattie* factors, to argue that the court abused its discretion by failing to consider all of the relevant factors. We decline to limit our review of the district court's analysis to the minute order, however, given that a "minute order [is] ineffective for any purpose." *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987). In its written order, the district court addressed each of the three *Beattie* "good-faith" factors, finding that NLVI did not bring its claims in bad faith, the City's offer was not unreasonable given its position regarding the LOI's plain language, and NLVI's decision to reject the offer and proceed to trial was not unreasonable or made in bad faith.[6] Because "the record clearly reflects that the district court properly considered the *Beattie* factors," *Wynn*, 117 Nev. at 13, 16 P.3d at 428-29, we defer to its discretion concerning "the propriety of granting attorney fees," *Certified Fire Prot.*, 128 Nev. at 383, 283 P.3d at 258. We therefore affirm the district court's post-judgment order insofar as it declines to award attorney fees.

The district court abused its discretion in denying costs for electronic trial preparation services

NRS 18.020(3) provides for an award of costs to the prevailing party "[i]n an action for the recovery of money or damages, where the

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[6]The district court also explained that because the three *Beattie* "good-faith factors" ultimately weighed against an award of fees, it did not need to conduct a thorough analysis of the fourth *Beattie* factor concerning the reasonableness of the amount of fees requested. *See Frazier v. Drake*, 131 Nev. 632, 644, 357 P.3d 365, 373 (Ct. App. 2015) (holding that where the three good-faith factors weigh against awarding attorney fees, the reasonableness of the amount of fees requested "becomes irrelevant").

plaintiff seeks to recover more than $2,500." Taxable costs must be provided for by statute; otherwise, the district court retains sound, but not unlimited, discretion to determine which expenses are allowable as costs. *See Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 431, 132 P.3d 1022, 1036 (2006); *see also Cadle Co.*, 131 Nev. at 120, 345 P.3d at 1054 (noting that the court's discretion in this regard has some boundaries); 20 Am. Jur. 2d *Costs* § 1 (2022) (explaining that "costs are not synonymous with expenses . . . 'costs' are limited to necessary expenses" and "expenses" are "those expenditures made by a litigant in connection with an action that are normally not recoverable from the opponent . . . absent a special statute or the exercise of judicial discretion"). NRS 18.005 lists the categories of taxable costs, which includes costs for "[a]ny . . . reasonable and necessary expense incurred in connection with the action." NRS 18.005(17); *see also Cadle Co.*, 131 Nev. at 120, 345 P.3d at 1054 (recognizing that any cost awarded "must be reasonable, necessary, and actually incurred").

The City argues that the district court abused its discretion by retaxing its costs for deposition videography services, electronic discovery, and electronic trial preparation services. The parties do not dispute that these costs were reasonable and actually incurred, only whether they were necessarily incurred.[7]

Deposition videography services

The first item of costs the City challenges is for videotaping three depositions. Under NRS 18.005(2), a prevailing party may recover its taxable costs for court reporter fees for taking depositions. The statute is

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[7]Indeed, it appears that the parties jointly selected many, if not all, of the third-party service providers and agreed to split the costs associated with their services.

silent, however, as to whether the district court may properly tax costs for videotaped depositions. "[T]he costs of videotaping depositions . . . are not allowed when no statute or any uniform course of procedure authorizes the taxation of such costs." 20 Am. Jur. 2d *Costs* § 43 (2022); *see also Armstrong v. Onufrock*, 75 Nev. 342, 349, 341 P.2d 105, 108-09 (1959) (reasoning that a party who chooses to take a deposition must bear the expense of the copies they order, "without the right of reimbursement from the losing party").

We conclude that the district court did not abuse its discretion in denying costs for the videotaped depositions. As the district court correctly observed, the City failed to demonstrate that its costs for videotaping certain depositions were necessarily incurred. Not only did the City not use those video depositions at trial, it also did not explain why obtaining videos of those depositions was *necessary*, particularly where the district court did not order the parties to record their depositions on video.

Electronic discovery database

The City next challenges the district court's decision to retax its costs for electronic discovery, arguing that it necessarily incurred those costs to access and exchange discovery. Although the parties agreed to use a central electronic discovery database to disclose, exchange, and store discovery, this was an elective charge likely chosen for the parties' convenience. Because the City did not demonstrate that this cost was necessary, we conclude that the district court did not abuse its discretion by denying the City's costs for electronic discovery.

Electronic trial preparation services

Lastly, the City challenges the denial of all the costs it incurred for using a trial technology services provider, as the district court awarded only the costs incurred during the trial and awarded no costs incurred pretrial. The district court reasoned that the retaxed costs were for "trial

preparation services" that were not a taxable cost under NRS 18.005(17). We agree with the City that the district court abused its discretion in this respect.

"Costs for trial preparation may be considered necessary and are awardable." 20 Am. Jur. 2d *Costs* § 37 (2022); *see also Hesterberg v. United States*, 75 F. Supp. 3d 1220, 1227 (N.D. Cal. 2014) (authorizing the recovery of costs for preparing court-ordered trial exhibits). Below, the district court ordered the parties to present all evidence at trial electronically and wholly disallowed the use of paper exhibits. Because of this edict, the parties jointly selected and retained a trial technology services provider to assist them and split the provider's costs. As the district court ordered the parties to present all of their trial exhibits electronically, the parties necessarily had to incur costs for their trial technology services provider to upload and prepare those exhibits before the trial began. Therefore, we conclude that the City demonstrated that the costs for trial preparation were necessarily incurred and the district court abused its discretion in finding otherwise. *See Logan*, 131 Nev. at 267, 350 P.3d at 1144. Accordingly, we reverse the district court's decision to retax the City $1000 for trial preparation services.

CONCLUSION

Because the parties' LOI did not obligate the City to repay NLVI for its costs, the district court properly entered judgment for the City on NLVI's breach-of-contract claims. We also conclude that the district court's written post-judgment order sufficiently discussed the requisite factors when considering the City's request for attorney fees. Finally, the district court properly exercised its discretion to retax the City for those costs it incurred voluntarily, rather than necessarily. However, the City demonstrated that it necessarily incurred its costs for electronic trial

preparation services because the district court ordered it to incur such costs. The district court therefore abused its discretion by concluding that the City had not necessarily incurred those costs and retaxing them from the City's costs award. Accordingly, we affirm the judgment in Docket No. 83257, and we affirm in part and reverse in part the district court's order in Docket No. 83617 and remand for further proceedings consistent with this decision.

_____, C.J.
Stiglich

We concur:

_____, J.
Parraguirre

_____, Sr. J.
Gibbons